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AMIRTHANAYAKI KUMARASAMY

v.

LEMBAGA KELAYAKAN PROFESION UNDANG-UNDANG, MALAYSIA

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COURT OF APPEAL, PUTRAJAYA
SURIYADI HALIM OMAR JCA
WAN ADNAN MUHAMAD JCA
RAMLY ALI J

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[CIVIL APPEAL NO: N-01-113-2007]
13 APRIL 2009

CIVIL PROCEDURE: *Mode of commencement - Judicial review, application for - Whether must be in Form 111A, O. 53 Rules of the High*

D

Court 1980 - Whether O. 53 r. 2(1) mandatory - Whether application commenced by originating summons should be struck out - Likelihood of prejudice - Justice of the case - Application of O. 1A - Procedure and affidavit evidence, similarities between originating summons and application under O. 53

E

CIVIL PROCEDURE: *Judicial review - Application for - Mode of commencement - Whether must be in Form 111A, O. 53 Rules of the High Court 1980 - Whether O. 53 r. 2(1) mandatory - Whether application commenced by originating summons should be struck out - Likelihood of*

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prejudice - Justice of the case - Application of O. 1A - Procedure and affidavit evidence, similarities between originating summons and application under O. 53

The plaintiff obtained her LL.B. (Hons) from the University of Wolverhampton in 1995 and her Graduate Diploma in Legal

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Practice from the University of Western Australia in 1999. On 8 September 1999, she wrote to the respondent seeking clarification as to whether she would be a "qualified person" under the Legal Profession Act 1976 ('LPA'). The defendant replied in the negative. Thereafter, the plaintiff wrote numerous letters of appeal to the

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defendant but these were not entertained. Finally, on 7 April 2006, the defendant informed the plaintiff that her application/appeal had been rejected on 28 March 2006. The plaintiff then filed an originating summons seeking, *inter alia*, to set aside the defendant's decision and for a declaration that she is a "qualified person" under

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s. 3 LPA. The High Court struck out the plaintiff's amended originating summons on the sole ground that she had failed to

comply with the mandatory provisions of O. 53 Rules of the High Court 1980 ('RHC'). It was held that the plaintiff had committed a fatal procedural error in commencing proceedings by way of originating summons when applications for judicial review (*certiorari*/ declaration) have to be made specifically in Form 111A pursuant to O. 53 r. 2(1) RHC. The plaintiff appealed.

Held (allowing the appeal by majority)
Per Ramly Ali JCA delivering the majority judgment:

(1) The requirement in O. 53 r. 2(1) RHC is not mandatory. The justice of the case should always prevail. A litigant ought not to be deprived of his day in court merely on a technical procedural-ground. Although the plaintiff had commenced his action by way of originating summons and not through Form 111A under O. 53 r. 2(1) RHC, all the relevant facts and evidence had nevertheless been forwarded to the court. No prejudice was caused to any party in the matter. It was thus unfair for the court below to have struck out the plaintiff's application without hearing its merits. Regard should have been had to O. 1A RHC which exhorts that – in administering the rules of court, a judge shall consider the justice of the particular case and not only the technical non-compliance of any rules. *Beauford Baru Sdn Bhd v. Gopala Krishnan VK Gopalan* HC (foll); *Megat Najmuddin Dato' Seri (Dr) Megat Khas v. Bank Bumiputra Malaysia Bhd* FC (foll). (paras 12, 13, 14 & 15)

(2) The previous decision of this court in *Ahmad Jefri Mohd Jahri v. Pengarah Kebudayaan & Kesenian Johor & Ors* CA, per Abdul Malik Ishak JCA – which held that it was an abuse of the process of the court for the plaintiff there to commence proceedings by way of a writ and statement of claim instead of filing an application for judicial review under O. 53 RHC – was distinguishable on the facts. This was because proceedings by way of a writ of summons and statement of claim involve the oral testimony of witnesses whereas an application for judicial review only involves affidavit evidence. In the instant case, the plaintiff commenced his action by filing an originating summons supported by affidavit evidence – which was, substantially, the same procedure/evidence as would be required in an application for judicial review under O. 53 RHC. There was no likelihood of prejudice. (paras 16, 17, 18 & 19)

[Matter remitted to High Court for hearing on merits.]

A ***Bahasa Malaysia*** *Translation Of Headnotes*

Plaintif memperolehi LL.B. (Hons)nya dari Universiti Wolverhampton pada 1995 dan Diploma Ijazahnya dalam Amalan Undang-undang dari Universiti Western Australia pada 1999. Pada 8 September
B 1999, beliau menulis kepada responden mencari penerangan sama ada beliau adalah "orang berkelayakan" di bawah Akta Profesion Undang-Undang 1976 ('APU'). Defendan menjawab secara negatif. Selepas itu, plaintiff menulis beberapa surat rayuan kepada defendan tetapi mereka tidak dilayan. Akhirnya, pada 7 April 2006, defendan
C memberitahu plaintif bahawa permohonan/rayuan beliau telah ditolak pada 28 Mac 2006. Plaintif kemudiannya memfailkan suatu saman pemula menuntut, antara lain, untuk mengenepikan keputusan defendan dan untuk sesuatu deklarasi bahawa beliau adalah "orang berkelayakan" di bawah s. 3 APU. Mahkamah Tinggi membatalkan
D saman pemula plaintif yang dipinda atas alasan tunggal bahawa beliau telah gagal mengikut peruntukan-peruntukan mandatori A. 53 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT'). Ia telah diputuskan bahawa plaintif telah melakukan suatu kesilapan prosedur yang fatal dengan memulakan prosiding melalui saman pemula
E apabila permohonan-permohonan untuk semakan kehakiman (certiorari/deklarasi) perlu dibuat secara khusus dalam Borang 111A menurut kepada A. 53 k. 2(1) KMT. Plaintif membuat rayuan.

Diputuskan (membenarkan rayuan secara majoriti)
F **Oleh Ramly Ali HMR menyampaikan penghakiman majoriti:**

(1) Keperluan dalam A. 53 k. 2(1) KMT tidak mandatori. Keadilan kes selalunya mesti diutamakan. Seseorang litigan tidak seharusnya dinafikan peluangnya di mahkamah hanya disebabkan suatu alasan-prosedural teknikal. Walaupun plaintif
G telah memulakan tindakannya melalui saman pemula dan bukan melalui Borang 111A di bawah A. 53 k. 2(1) KMT, namun begitu semua fakta-fakta dan keterangan relevan telahpun dikemukakan ke mahkamah. Tidak ada prejudis yang diakibatkan kepada mana-mana pihak dalam perkara ini. Ia
H adalah oleh itu tidak adil bagi mahkamah bawahan membatalkan permohonan plaintif tanpa mendengar merit-meritnya. Perhatian sepatutnya diberi kepada A. 1A KMT yang mengatakan bahawa – dalam melaksanakan kaedah-kaedah mahkamah, seseorang hakim harus menimbangkan keadilan sesuatu kes dan bukan
I ketidakpatuhan teknikal mana-mana kaedah. *Beauford Baru Sdn*

Bhd v. Gopala Krishnan VK Gopalan (diikuti); *Megat Najmuddin Dato' Seri (Dr) Megat Khas v. Bank Bumiputra Malaysia Bhd* (diikuti). A

(2) Keputusan sebelumnya mahkamah ini dalam *Ahmad Jefri Mohd Jahri v. Pengarah Kebudayaan & Kesenian Johor & Ors*, oleh Abdul Malik Ishak HMR – yang mendapati bahawa ia adalah suatu penyalahgunaan proses mahkamah bagi plaintif di situ memulakan prosiding melalui writ dan pernyataan tuntutan dan bukan memfailkan suatu permohonan untuk semakan kehakiman di bawah A. 53 KMT – boleh dibezakan berdasarkan fakta-fakta. Ini adalah kerana prosiding melalui writ saman dan pernyataan tuntutan melibatkan testimoni lisan saksi-saksi manakala suatu permohonan untuk semakan kehakiman hanya melibatkan keterangan afidavit. Dalam kes semasa, plaintif memulakan tindakannya dengan memfailkan sesuatu saman pemula disokong oleh keterangan afidavit – yang merupakan, secara substantif, prosedur/keterangan sama yang diperlukan dalam suatu permohonan untuk semakan kehakiman di bawah A. 53 KMT. Tiada apa-apa kemungkinan prejudis. B C D

[Perkara diremitkan ke Mahkamah Tinggi untuk dibicara atas merit-meritnya.] E

Case(s) referred to:

Ahmad Jefri Mohd Jahri v. Pengarah Kebudayaan & Kesenian Johor & Ors [2008] 6 CLJ 473 CA ***(dist)*** F

Beauford Baru Sdn Bhd v. Gopala Krishnan VK Gopalan [2002] 3 CLJ 686 HC ***(foll)***

Megat Najmuddin Dato' Seri (Dr) Megat Khas v. Bank Bumiputra Malaysia Bhd [2002] 1 CLJ 645 FC ***(foll)***

Legislations referred to: G

Legal Profession Act 1976, ss. 3, 12

Rules of the High Court 1980, O. 1A, O. 18 r. 19(1)(b), (d), O. 53 r. 2(1)

For the appellant - Christian Chandran Aiyathurai; M/s CC Aiyathurai & Co
For the respondent - Wong Kian Kheong (Alex Tan Chie Sian with him); M/s Wong Kian Kheong H

[Appeal from High Court, Seremban; SP No: 24-626-2006]

Reported by Gan Peng Chiang I

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JUDGMENT

Ramly Ali J:

[1] The present appeal is against the decision of the learned High Court Judge on 10 October 2007 dismissing the appellant's amended originating summons on the ground that the appellant by commencing proceedings by way of originating summons, had failed to comply with the provisions of O. 53 of the Rules of the High Court 1980.

[2] The events leading to this appeal may be summed up as follows:

(a) the appellant had on 20 February 1995 obtained her "Bachelor of Laws Degree with Third Class Honours" from Wolverhampton University, United Kingdom. After that she had undergone the Graduate Diploma in Legal Practice course at the University of Western Australia and obtained the relevant certificate on 21 April 1999;

(b) the appellant first wrote to the respondent (Legal Profession Qualifying Board Malaysia) on 8 September 1999 with regard to the question of whether she was a "qualified person" as defined under the LPA or otherwise;

(c) the Director of the respondent, one Encik Khalid bin Yusof informed the appellant that she was not a "qualified person" as defined under the LPA by way of a letter dated 26 October 1999;

(d) by a letter dated 20 December 1999, the appellant appealed to the respondent to re-determine her position in light of certain fresh supporting documents she had obtained;

(e) on 20 March 2000, the appellant wrote to the respondent:

(i) demanding a reply from the respondent within 14 days as regards the question of whether she was a "qualified person" as defined under the LPA or otherwise; and

(ii) the appellant informed the respondent that she might go to court to seek a declaration in the event that the respondent should decide that she was not a "qualified person" as defined under the LPA;

(f) the respondent did not reply to either the appellant's letter dated 20 December 1999 or the appellant's letter dated 20 March 2000;

(g) the appellant wrote again a letter on 18 October 2005 appealing to the respondent to consider the same question of whether she was a "qualified person" as defined under the LPA;

(h) on 2 March 2006, a meeting was held between the appellant's husband, Mr. E. Yawanarajah and Dato' Noraini Abdul Rahman, the then Director of Examination for the Certificate of Legal Practice as regards the appellant's status;

(i) on 6 March 2006, the appellant wrote again to the respondent on the same issue and sought a reply from the respondent as regard her status; and

(j) by a letter dated 7 April 2006, the respondent informed the appellant that the respondent had on 28 March 2006 decided to reject the appellant's application.

[3] In the amended OS, the appellant sought the following reliefs against the respondent:

(a) an order that the respondent's decision dated 28 March 2006 be set aside;

(b) the appellant be declared a "qualified person" as defined under s. 3 LPA; and

(c) the appellant be given leave to attend as a pupil to any person qualified to be her master for a period of nine months under s. 12 LPA.

[4] On 10 October 2007, the High Court Judge dismissed the appellant's amended originating summons on the ground that the appellant, by commencing proceedings by way of originating summons, had failed to comply with the mandatory provisions of O. 53 Rules of the High Court 1980. Hence the present appeal.

[5] The learned counsel for the appellant argued that the process initiated by the appellant by way of originating summons in the present case is correct and the learned High Court Judge should not have dismissed the appellant's application on the ground that the appellant had initiated the proceedings by way of a wrong process.

[6] The learned counsel for the respondent on the other hand contended that the appellant's application is in actual fact for judicial review, for *certiorari*; therefore the process must be way of specific format (Form 111A) under O. 53 of the Rules of the High Court 1980, not by way of originating summons.

[7] The learned High Court Judge in his judgment appears to have agreed with the respondent's counsel on this issue and concluded: "Justeru tanpa perlu melihat kepada merit permohonan plaintif, maka adalah diperintahkan permohonan plaintif di Lampiran 11A dibatalkan dengan kos."

The learned High Court Judge was of the view that the requirement under O. 53 of the Rules of the High Court 1980 is mandatory in nature and failure to comply with it will result in the application being struck out.

[8] Order 53 of the Rules of the High Court 1980 provides for matters relating to application for judicial review (which include for order for *certiorari*). The relevant provisions of O. 53 are as follows:

> 1(1) This Order shall govern all applications seeking the relief specified in paragraph 1 of the Schedule to the Courts of Judicature Act 1964 and for the purposes therein specified.
>
> 2(1) An application for any reliefs specified in paragraph 1 of the Schedule to the Courts of Judicature Act 1964 (other than an application for an order of *habeas corpus*) shall be in Form 111A.
>
> (2) An application for judicial review may seek any of the said reliefs, including a prayer for a declaration either jointly or in the alternative in the same application if it relates to or in connected with the same subject matter.

[9] Order 53 governs all applications seeking the relief specified in para. 1 of the Schedule to the Courts of Judicature Act 1964 and for the purposes therein specified. Paragraph 1 of the said schedule stipulates, that additional powers of the High Court include powers to issue to any person or authority directions, orders or writs, including writs of the nature of *habeas corpus, mandamus,* prohibition, *quo/warrantor* and *certiorari*, or any others for the enforcement of the rights conferred by Part 11 of the constitution, or any of them or for any purpose.

[10] The only reason why the learned High Court Judge struck out the appellant's application was that the appellant had failed to commence the application by way of Form 111A as required under O. 53 r. 2(1) of the Rules of the High Court 1980. From the grounds of judgment, it appears that there is no other reason for striking out the application. The relevant part of the grounds of judgment is reproduced below:

> Sehubungan dengan peruntukan-peruntukan di atas penelitian ke atas permohonan Plaintif mendapati bahawa permohonan tersebut (lampiran 11A) dibuat melalui Saman Pemula, iaitu bertentangan dengan kehendak kaedah 2(1) yang dinyatakan di atas, di mana permohonan untuk "judicial review" hendaklah dibuat mengikut bentuk dan format yang terdapat di dalam Borang 111A Kaedah-Kaedah Mahkamah Tinggi 1980. Adalah jelas dan tidak diragui bahawa pematuhan kepada peruntukan berkenaan adalah keperluan mandatori di mana kegagalan mematuhinya akan menyebabkan permohonan Plaintif terbatal.

[11] It is also pertinent to note that the application was struck out by the learned High Court Judge without having considered the merits of the application. This is clearly admitted by the learned judge in the last paragraph of his grounds of judgment.

[12] With respect, this court (by majority decision) cannot agree with the findings of the learned High Court Judge on this issue. This court agrees with the requirements under O. 53 of the Rules of the High Court 1980 relating to application of this nature, but the Court cannot agree that the said requirements are mandatory in nature as found by the learned High Court Judge. To this court, justice of the case should prevail. A person or litigant should not be deprived of his/her day in a court of law just on technical procedural grounds like in the present case. Even if the appellant had commenced the application by way of originating summons (not by way of Form 111A as required under O. 53), all the relevant facts and evidence for consideration had been forwarded to the court. No prejudice was ever occasioned to any party in the proceedings, including the court. To strike out the appellant's application at this stage of the proceedings (without hearing the merits) is obviously unfair to the appellant who came to court to seek justice and a fair hearing.

[13] The above finding is in line with the provision of O. 1A of the Rules of the High Court 1980 which stresses that the court or judge shall have regard to justice of a case. The said O. 1A provides:

> In administering any of the rules herein the Court or a judge shall have regard to the justice of the particular case and not only to the technical non-compliance of any of the rules herein.

[14] Such procedural technical objections (as in the present case) should not be allowed to obstruct the process of justice to the deserving. As we move towards the era of facilitating the process of litigation, the raising of objection on technical grounds would certainly and clearly be a thing of the past. It is clearly the intention and wisdom of the Rules Committee to provide for the smooth administration of the due process and administration of justice by way of substantial merits of the case and not merely on procedural technical defaults. (see: *Beauford Baru Sdn Bhd v. Gopala Krishnan a/l VK Gopalan* [2002] 3 CLJ 686).

[15] A judge should not be so besotted by the rules that his sense of justice and fairness becomes impaired because of his blithered fixation on technicalities of the rules and the cold letter of the law (see: *Megat Najmuddin bin Dato' Seri (Dr) Megat Khas v. Bank Bumiputra Malaysia Bhd* [2002] 1 CLJ 645 – per: Mohtar Abdullah FCJ).

[16] The learned counsel for respondent cited the Court of Appeal's case of *Ahmad Jefri Mohd. Jahri v. Pengarah Kebudayaan & Kesenian Johor & Ors* [2008] 6 CLJ 473 to support his contention that in an application of this nature (as in the present case) the appellant should have commenced the proceedings by way of an application for judicial review under O. 53 of the Rules of the High Court 1980. In that case, there was an appeal against the decision of the Judicial Commissioner allowing the respondent's application under O. 18 r. 19(1)(b) or (d) of the Rules of the High Court 1980 to strike out the appellant's writ and statement of claim, on the grounds that it was "scandalous, frivolous or vexatious" or "an abuse of the process of the court" to commence proceedings by way of a writ instead of by way of an application for judicial review under O. 53 of the Rules of the High Court 1980. The only issue requiring determination in that case was whether it was an abuse of

the process of the court to commence proceedings by way of a writ and statement of claim instead of filing an application for judicial review under O. 53 of the Rules of the High Court 1980.

[17] The Court of Appeal dismissed the appeal and answered the above question in the positive ie, it was an abuse of the process of the court to commence the proceedings by way of a writ and statement of claim instead of filing an application for judicial review under O. 53 of the Rules of the High Court 1980.

[18] The relevant facts of that case can be distinguished from the relevant facts of the instant appeal. In that case the appellant commenced the proceedings by way of writ summons and statement of claim, instead of by way of an application for judicial review. Proceedings by way of a writ summons and statement of claim involve oral testimonies of witnesses through the process of examination in chief, cross-examination and re-examination; while an application for judicial review only involves evidence by affidavits.

[19] In the instant appeal, the appellant commenced proceedings by way of originating summons (not by way of writ summon and statement of claim) supported by affidavit evidence (the same evidence as required for an application for judicial review). The procedures and affidavit evidence involved in an originating summons and an application for judicial review are substantially the same. There is unlikelihood of parties being prejudiced throughout the proceedings. On this ground the court is of the view that the facts in *Ahmad Jefri*'s case may be distinguished from the facts of the instant appeal and thus the ruling in that case (as cited by the learned counsel for the respondent) may not be applicable to the instant appeal.

[20] For the above considerations, this court (by majority decision) allows the appeal with costs, subject to the case being sent back to the same High Court to hear the merits of the application. The order of the High Court is hereby set aside and deposit to be refunded.